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Supreme Court of the United States

OCTOBER TERM, 1946

NO. 418

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT

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INDEX.

PAGE

Official Reports of the proceeding in the Court below, and before the Board 1

Counter-Statement of the Question Involved 2

Counter-Statement of the Case 3

Summary of Argument 10

Argument 12

I. To decide the important question presented here, it is unnecessary to determine whether the Court below should have decided the case upon the record made before the Board alone, without considering the additional facts stipulated and laid before it by the Board 12

1. The Board's criticisms of the Circuit Court's procedure are wholly untenable, both in fact and in law 12

2. And at all events, the question of procedure raised by the Board is of no controlling importance in the case 17

II. Under the National Labor Relations Act, the Labor Board cannot command that a Union, which is qualified as exclusive representative of the rank and file steelworkers in a large steelworks, shall be recognized at the same time as exclusive representative of plant police who represent management and the public in the exercise of control over the rank and file 18

PAGE

1. The Board has, until very recently, recognized its duties, under the Act, to limit union organization at the line between labor and management, and to forbid the representation of agents of management by rank and file unions..... 18

2. The new rule of law, recently established by the Board and presented here, differs from the new rule presented for consideration by the *Packard Motor Car Co.* case, now under advisement by the Court..... 27

3. By its reliance upon a literal reading of the Act, to support a wholly new interpretation, the Board has ignored the applicable canons of statutory interpretation.. 30

   (a) The canon preferring a reasonable over a literal construction)..... 30

   (b) The canon which had given an almost conclusive presumption of correctness to the Board's own long established, contrary interpretation 33

4. The Board's new rule, abolishing the line between non-union management and union labor, would subvert instead of effectuate the policies of the Act..... 36

   (a) This is a test of the validity of every order of the Board..... 36

   (b) The Board's new rule would violate the purpose of the Act to maintain the freedom of rank and file unions

PAGE

from any influence by representatives of management 37

(c) The Board's new rule would violate the purpose of the Act to avoid any unnecessary impairment of the functions of management..... 43

(d) The Board's new rule, if applied to the military or municipal police who figure in this case, would violate the purpose of the Act to avoid any infringement of the public interest in the preservation of law and order... 50

5. In the separation of non-union management and union labor contemplated by the Act, the police involved here must be classified as agents of management..... 54

6. The status of policemen under the Act is not affected by the inconclusive experiences described in the Board's brief..... 63

7. The status of the policemen who are involved in this case is not affected by their "demilitarization" 66

III. Conclusion 69

Appendix:

Correspondence between counsel for the Board and for the respondent, concerning the stipulation of facts filed in the Circuit Court of Appeals 71

PAGE

"Constitution of International Union United Steelworkers of America, CIO," Oath and Obligations of members of the Union..... 78

National Labor Relations Act (49 Stat 449)

Section 1 "Findings and Policy"..... 80

Section 2 "Definitions":
2 (2) "Employer" 81
2 (3) "Employee" 82

Section 3 (c) Annual Report of Board.... 82

Section 7 "Rights of Employees"..... 82

Section 8 Unfair Labor Practices..... 82

Section 9 "Representatives and Elections"..... 83

Section 10 "Prevention of Unfair Labor Practices" 85
10 (a) Jurisdiction of the Board.. 85
10 (b) Procedure before the Board 85
10 (c) Decisions by the Board.... 86
10 (e) Petitions for Enforcement of Board Orders..... 86
10 (f) Petitions for Review of Board Orders 88

Section 16 Title of Act..... 88

TABLE OF CASES.

	PAGE
American Forge Co., In re, 44 N.L.R.B. 826 (1942)	63
American Machine & Foundry Co., 14 N.L.R.B. 497 (1939)	60
Armour & Co., 13 N.L.R.B. 1143 (1939)	60
Armour & Co., 26 N.L.R.B. 1046 (1940)	61
Automotive Maintenance Co., 13 N.L.R.B. 338 (1939)	60
F. E. Booth Co., 10 N.L.R.B. 1491 (1939)	60
Burnside Steel Foundry, 7 N.L.R.B. 714 (1938)	60
J. I. Case Co. v. N.L.R.B., 321 U.S. 332; 88 L. Ed. 762 (1944)	54
Century Metalcraft Co. v. F.T.C., 112 Fed. (2d) 443 (7 C.C.A., 1940)	15
Church of the Holy Trinity v. U.S., 143 U.S. 457; 36 L. Ed. 226 (1892)	31
Cleveland Hobbing Machine Co., 18 N.L.R.B. 412 (1939)	61
Consolidation Edison Co. v. N.L.R.B., 305 U.S. 197; 83 L. Ed. 126 (1938)	43
Davis v. Department of Labor, 317 U.S. 249; 87 L. Ed. 246 (1942)	34
Elliott Bay Lumber Co., 9 N.L.R.B. 3 (1938)	60
H. J. Heinz Co. v. N.L.R.B., 311 U.S. 514; 85 L. Ed. 309 (1941)	41
Indiana Quartered Oak Co. v. F.T.C., 58 Fed. (2d) 182 (2 C.C.A., 1932)	15
Ingram-Richardson Mfg. Co., 9 N.L.R.B. 200 (1938)	60
Inland Steel Co., 9 N.L.R.B. 783 (1938)	60

PAGE

International Association of Machinists v. N.L.R.B., 311 U.S. 72; 85 L. Ed. 50 (1940) 42, 56, 57

Jones & Laughlin Steel Corporation, etc., In re, 49 N.L.R.B. 390 (1943) 2
Jones & Laughlin Steel Corporation, etc., In re, 53 N.L.R.B. 1046 (1943) 2
Jones & Laughlin Steel Corporation, In re, 66 N.L.R.B. 386 (March 7, 1946); 71 N.L.R.B. No. 203 (December 30, 1946; 19 L.R.R.M. 1108) 25, 28, 32, 44

Law v. U.S., 266 U.S. 494; 69 L. Ed. 401 (1925) 14

Magnolia Petroleum Co., 18 N.L.R.B. 380 (1939) ... 61
Markham v. Cabell, 326 U.S. 404; 90 L. Ed. 168 (1945) 32
Maryland Drydock Company, In re, 49 N.L.R.B. 733 (1943) 22, 28, 33
Memphis v. U.S., 97 U.S. 293; 24 L. Ed. 920 (1878) .. 14
Mercelis v. Wilson, 235 U.S. 579; 59 L. Ed. 370 (1915) 14

N.L.R.B. v. E. C. Atkins & Co., 147 Fed. (2d) 730 (7 C.C.A., 1945) 37
N.L.R.B. v. E. C. Atkins & Co., 155 Fed. (2d) 567 (7 C.C.A., 1946) 37, 65, 66
N.L.R.B. v. Delaware-New Jersey Ferry Co., 128 Fed. (2d) 130 (3 C.C.A., 1942) 52
N.L.R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240; 83 L. Ed. 627 (1939) 32, 47
N.L.R.B. v. Indiana Desk Co., 149 Fed. (2d) 987 (7 C.C.A., 1945) 47
N.L.R.B. v. Jones & Laughlin Steel Corporation, 146 Fed. (2d) 718 (December 8, 1944) 1, 8

PAGE

N.L.R.B. v. Jones & Laughlin Steel Corporation, 154 Fed. (2d) 932 (6 C.C.A., April 4, 1946) 1, 9, 50

N.L.R.B. v. Jones & Laughlin Steel Corporation, 325 U.S. 838; 89 L. Ed. 1965 (June 4, 1945) 2, 8

N.L.R.B. v. Link Belt Company, 311 U.S. 584; 85 L. Ed. 368 (1941) 42

N.L.R.B. v. Newport News Shipbuilding Co., 308 U.S. 241; 84 L. Ed. 219 (1939) 15, 16

N.L.R.B. v. Packard Motor Car Co., 157 Fed. (2d) 80 (6 C.C.A., 1946) 29, 33

N.L.R.B. v. Pennsylvania Greyhound Lines, 303 U.S. 261; 82 L. Ed. 831 (1938) 38

N.L.R.B. v. Williamson-Dickie Mfg. Co., 130 Fed. (2d) 260 (5 C.C.A., 1942) 47

Packard Motor Car Company, In re, 61 N.L.R.B. 4 (1945) 25, 27, 56

Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177; 85 L. Ed. 1271 (1941) 48, 50, 52, 53

Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146; 85 L. Ed. 1251 (1941) 36

R.C.A. Manufacturing Co., In re, 2 N.L.R.B. 159 (1936) 60

Rochester and Pittsburgh Coal Co., In re, 56 N.L.R.B. 1760 (1944) 24, 45

Skidmore v. Swift & Co., 323 U.S. 134; 89 L. Ed. 124 (1944) 34

Solvay Process Co. v. N.L.R.B., 117 Fed. (2d) 83 (5 C.C.A., 1941) 40

Soss Manufacturing Co., In re, 56 N.L.R.B. 348 (1944) 24, 44

PAGE

Southern California Gas Co., In re, 10 N.L.R.B. 1123 (1939) 60

Southern Steamship Co. v. N.L.R.B., 316 U.S. 31; 86 L. Ed. 1246 (1942) 32, 46, 50, 52, 53

Southport Petroleum Co., 8 N.L.R.B. 792 (1938) ... 60

Todd-Johnson Dry Docks Co., 18 N.L.R.B. 973 (1939) 61

Union Collieries Coal Company, In re, 41 N.L.R.B. 961 (1942) 21

Union Collieries Coal Company, In re, 44 N.L.R.B. 165 (1942) 21, 24, 25, 28, 33

U. S. v. Carbone, 327 U.S. 633; 90 L. Ed. 679 (1946) 32

U. S. v. Midwest Oil Co., 236 U.S. 459; 59 L. Ed. 673 (1915) 34

U. S. v. Swift & Co., 286 U.S. 106; 76 L. Ed. 999 (1932) 15

United States Stamping Co., In re, 1 N.L.R.B. 123 (1936) 20

West Kentucky Coal Co., In re, 10 N.L.R.B. 88 (1938); 116 Fed. (2d) 816 (6 C.C.A., 1940) ... 61

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NO. 418

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v.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT

Official Reports of the proceeding in the Court below, and before the Board.

In this case the Court is called upon to review the decision of the Sixth Circuit Court of Appeals, reported as *N.L.R.B. v. Jones & Laughlin Steel Corporation,* 154 Fed. (2d) 932 (April 4, 1946). An earlier decision of the same case, *N.L.R.B. v. Jones & Laughlin Steel Corporation,* 146 Fed. (2d) 718 (December 8, 1944), was considered here, on the Labor Board's petition for cer-

tiorari at No. 1237 October Term, 1944; and the record was remanded for further consideration of alleged new circumstances: *N.L.R.B. v. Jones & Laughlin Steel Corporation,* 325 U.S. 838 (June 4, 1945). The Labor Board's decisions, here under review, are reported as *In re Jones & Laughlin Steel Corporation, etc.,* 49 N.L.R.B. 390 (a direction of elections issued May 3, 1943, and printed in the Transcript here at R. 52), and *In re Jones & Laughlin Steel Corporation, etc.,* 53 N.L.R.B. 1046 (a final cease and desist order dated December 2, 1943, and printed at R. 73).

COUNTER-STATEMENT OF THE QUESTION INVOLVED.

It is believed that this case presents only one question of any importance, *viz.*:

Was it the purpose of the National Labor Relations Act to provide that a single labor Union shall be entitled to command recognition as exclusive representative of the rank and file laborers in a large steelworks, and, at the same time, of the members of a small force of police who are solely responsible, to the owners of the steelworks and to the public, for the day-to-day maintenance of law and order and the enforcement of managerial authority in the Works?

COUNTER-STATEMENT OF THE CASE.

Jones & Laughlin Steel Corporation owns and operates several steel manufacturing Works. Amongst them is the Otis Works. It is a large enterprise, occupying two tracts of land located in outlying districts of Cleveland, Ohio, which have an aggregate area of almost four hundred acres (R. 5, 116).

In the operation of the Otis Works, the Steel Corporation normally employs about 4,700 individuals (R. 5). The great bulk of this force, the class of employees known as "production and maintenance workers," has been represented for the purposes of collective bargaining, since long before this proceeding began, exclusively by the labor Union now known as the "United Steelworkers of America, C.I.O." (R. 5).

Late in 1942, the Steel Corporation and the Union entered into a new contract, by which were fixed the wages and other terms of employment of the Union's constituents; *i.e.*, of the "production and maintenance workers"; and by which the Union expressly disclaimed any jurisdiction of any of the other, much smaller classes of Company officers and agents, serving in the Works, but traditionally identified with management and not with labor. The classes so disclaimed were "* * * foremen and assistant foremen * * * who qualify for exemption (as executive or administrative officers or employees) under the Fair Labor Standards Act," and "* * * *watchmen,* salaried employees and nurses." (Italics supplied; R. 5, 16).

By this reference to "watchmen", the parties to the contract meant the members of the plant police force, an armed and uniformed corps which the Company had

always maintained as an agency of the management of the Works. It was, in other words, contemplated by the Agreement that during its term, or until it should be terminated after notice by either party (see R. 32), the Union should not claim any right to represent the members of the plant police force.

In spite of this, the Union commenced, within a matter of a few weeks after the 1942 contract was signed, a campaign to "organize" the plant police as members of the rank and file steelworkers' local Union, and so to "take them under its wing" (R. 14-15). By March 15, 1943, three months after the making of the contract, the Union filed with the Labor Board the Petition for Certification, which was the first step in this case (R. 1-2).

From that time, from the outset of this case that is, the Company has opposed the Union's attempt to qualify itself as exclusive representative of the policemen, upon two principal grounds (see R. 6-8; 60, etc.): first, that the National Labor Relations Act does not contemplate compulsory recognition by employers of a union of any class of agents who are traditionally and indispensably identified with management, or with law enforcement, or both; and, secondly, that the representation of the plant policemen by the same Union which represents the rank and file labor in the Works would, under such circumstances as have existed here, tend to subvert and not to effectuate the true policies of the Act, and is, for that reason, neither contemplated, required nor permitted by the Act.

To maintain these two arguments, which are, of course, closely related in principle, the Company has referred (as has the Board) to the position, functions and duties of the plant policemen: matters which the Board has, though sometimes grudgingly, conceded to be relevant to any appraisal of their status under the National Labor Relations Act.

The Otis Works police force is a small one—at the time of the hearing it numbered only about seventy officers and patrolmen (R. 8); but its members were charged with large private and public responsibilities. They were, to state it as briefly as possible, the sole law enforcing agents normally in service on the Company's property; the sole agency legally qualified and practically available to enforce Company rules and public laws amongst the thousands of rank and file steelworkers in the Works; and the sole agency normally present, in the Works, to do any of the other duties commonly assumed by civil policemen (R. 6, etc.; 115-117).

During a critical period of the late War, from August 5, 1942 until May 29, 1944, the plant policemen were all sworn and enrolled members of the Auxiliary Military Police Force, created by Executive Order No. 8972 (6 Fed. Reg. 6420) as an adjunct of the Army (R. 114; 6, etc.). At all other times, and since a period long before the War, the plant policemen have all been commissioned, sworn and bonded as private policemen of the City of Cleveland (R. 115). As such, they are public peace officers of the State of Ohio (R. 121); and as a practical matter the other public authorities have always delegated wholly to them the tasks of providing police protection in the Otis Works, and of preserving peace, law and good order there (R. 116). In addition, they

discharge certain duties as confidential agents of management; undertaking such things as the handling of pay rolls and the investigation of accidents, trespasses and violations of Company rules (R. 6; 116-117). They are, in short, under all normal conditions the ultimate efficient arm of the will of management and of the public in the enforcement of law and legal rights in the Otis Works.

As is not uncommon in such cases, the salaries or wages of the plant policemen are paid by the Company; their duties and work assignments have been (within the limits permitted by law and by the civil and military authorities) directed by a Company official known as the Director of Plant Security; and they have been subject (within the same limits) to discipline or discharge at the instance of the Company. They had never, prior to the commencement of this case, been sought or claimed as the constituents of any labor union (R. 8-11, etc.).

After an investigation of the facts asserted by the Union's petition, which was conducted under Section 9 of the Act and which included a hearing (R. 2, etc.), a "Decision and Direction of Election" (R. 52-55; 49 N.L.R.B. 390) and an election of the policemen (R. 33), the Board issued a "Certification of Representatives," dated and published June 5, 1943, by which it certified that in the election, duly conducted, the Union had been designated by a vote of 37 to 15, as the exclusive representative of all of the policemen for the purposes of collective bargaining under the Act (R. 34).

Immediately after the election, the Union's District Director requested of the Company that it open the

negotiation of an agreement with the Union, as exclusive representative of the policemen (R. 55). The Company's reply declined to accord the Union any such recognition (R. 56); and on August 13, 1943, the Union filed a Charge under Section 10 of the Act, by which it asserted that this denial of recognition was in violation of Sections 8 (1) and 8 (5) of the Act (R. 58).

About a month later, on September 16th, the Board issued a Complaint based on the Union's Charge (R. 35); and on September 28, 1943, it conducted a second hearing in the case. At this hearing the Company offered, as a statement intended to "clarify Respondent's present position in respect to bargaining with units composed of plant guards" (R. 50), a document addressed to the Labor Board which declared clearly one of the legal objections it relies upon here: that "the Petitioner is the same labor organization that represents production and maintenance employees in all of its steel plants." Its reliance upon its other principal objection: the related contention that plant guards are supervisors, and on that account exempt from union jurisdiction, was shown in the Board's own case (R. 56). Both objections had been raised months before, in a brief filed with the Board after its first hearing, at the outset of the case (see R. 52, 126), but not included in the Transcript here.

On December 2, 1943, after conducting the further proceedings contemplated by the Act and its rules, the Board handed down a final cease and desist order, mentioned in the opening paragraph of this brief, by which it commanded the Company to recognize the Union as exclusive representative of the Otis Works police force (R. 73). And on February 1, 1944, the Board filed in the Circuit Court below its petition for the enforcement

of its final cease and desist order, and so submitted to judicial review its own contentions, and the counter-contentions of the Company, concerning the status of the plant policemen under the Act.

In *N.L.R.B. v. Jones & Laughlin Steel Corporation*, 146 Fed. (2d) 718 (December 8, 1944), the Circuit Court set the Board's final order aside, basing its decision solely upon the evidence received at the Board's hearings and included in the Board's transcript. The Court's opinion (R. 83-89), held that the obligations of the policemen to deal with the rank and file steelworkers as agents of management and as auxiliary military police were so completely incompatible with those they must assume as the members of the rank and file union, as to make improper any compulsory recognition of the Union (R. 88-89).

The Board shortly filed a long petition for rehearing (R. 89-111). In one of a number of footnotes, it stated (though not as a matter of any particular importance) that it had been informed that the Steel Corporation's police force had recently been demilitarized (R. 93), so that the Otis Works policemen were no longer Auxiliary Military Police. On February 6, 1945, the Circuit Court denied the petition for rehearing, in an order which made no reference to the new fact of demilitarization, so alleged. The new fact was stated again, much more prominently, in the Board's petition for certiorari filed here at No. 1237 October Term, 1944; and, as a result, this Court's order in that proceeding vacated the decision of the Circuit Court, and remanded the case to it for further consideration of the alleged changed circumstances: 325 U.S. 838 (June 4, 1945).

After the remand, seeking some regular way to place the current situation of the plant police of record in the Circuit Court, the Board sought (rather insistently, as is shown by its correspondence, printed in the appendix to this brief) a stipulation of the new facts, and such a stipulation (R. 114) was made and filed by the Board in the Circuit Court, as an annex to, and the principal basis for, the Board's motion for a decree enforcing its order (R. 112). The Board's motion was opposed by the Company, and the case was argued again before the Circuit Court (R. 118). On April 4, 1946, the Circuit Court handed down its decision, since reported as *N.L.R.B. v. Jones & Laughlin Steel Corporation*, 154 Fed. (2d) 932. In this decision, the Court considered the new facts set out in the stipulation, presented as aforesaid by the Board (expressly rejecting the Company's objection to the use of ar evidence *dehors* the Board's transcript: R. 120), but i held the Company's other contentions by adhering to its original view of the law, and holding that, under the Act, the Board's order must be denied enforcement (R. 121, 122).

It is this decision which is now presented here for review.

SUMMARY OF ARGUMENT.

I. To decide the important question presented here, it is unnecessary to determine whether the Court below should have decided the case upon the record made before the Board alone, without considering the additional facts stipulated and laid before it by the Board.

1. The Board's criticisms of the Circuit Court's procedure are wholly untenable, both in fact and in law.

2. And at all events, the question of procedure raised by the Board is of no controlling importance in the case.

II. Under the National Labor Relations Act, the Labor Board cannot command that a Union, which is qualified as exclusive representative of the rank and file steelworkers in a large steelworks, shall be recognized at the same time as exclusive representative of plant police who represent management and the public in the exercise of control over the rank and file.

1. The Board has, until very recently, recognized its duties, under the Act, to limit union organization at the line between labor and management, and to forbid the representation of agents of management by rank and file unions.

2. The new rule of law, recently established by the Board and presented here, differs from the new rule presented for consideration by the *Packard Motor Car Co.* case, now under advisement by the Court.

3. By its reliance upon a literal reading of the Act, to support a wholly new interpretation, the Board has ignored the applicable canons of statutory interpretation.

(a) The canon preferring a reasonable over a literal construction.

(b) The canon which had given an almost conclusive presumption of correctness to the Board's own long established, contrary interpretation.

4. The Board's new rule, abolishing the line between non-union management and union labor, would subvert instead of effectuate the policies of the Act.

(a) This is a test of the validity of every order of the Board.

(b) The Board's new rule would violate the purpose of the Act to maintain the freedom of rank and file unions from any influence by representatives of management.

(c) The Board's new rule would violate the purpose of the Act to avoid any unnecessary impairment of the functions of management.

(d) The Board's new rule, if applied to the military or municipal police who figure in this case, would violate the purpose of the Act to avoid any infringement of the public interest in the preservation of law and order.

5. In the separation of non-union management and union labor contemplated by the Act, the police involved here must be classified as agents of management.

6. The status of policemen under the Act is not affected by the inconclusive experiences described in the Board's brief.

7. The status of the policemen who are involved in this case is not affected by their "demilitarization."

III. Since it interprets the Act and applies it correctly, the decree of the Court below should be affirmed.

ARGUMENT.

I. To decide the important question presented here, it is unnecessary to determine whether the Court below should have decided the case upon the record made before the Board alone, without considering the additional facts stipulated and laid before it by the Board.

1. *The Board's criticisms of the Circuit Court's procedure are wholly untenable, both in fact and in law.*

In the brief for the Labor Board (or at least in the printer's proof of that brief which has been served on the respondent), the Board devotes much attention to the proposition that the Court below should not have given any consideration to the stipulation filed with it by the Board on February 4, 1946.

By that stipulation (R. 114-117), the parties agreed that the Circuit Court might accept as facts a number of things, from which the following might be concluded: that the Otis Works plant police were enrolled as auxil-

iary military police on August 5, 1942; that they were demilitarized on May 29, 1944, or several months before the first of the two arguments in the Circuit Court; that, at all times since their demilitarization they had been sworn and enrolled as members of the police force of the City of Cleveland, and the only agents of that force doing duty in the Works; and that they had, since their demilitarization, been responsible for a wide variety of tasks which involved both the preservation of the Steel Corporation's interests as against those of rank and file steelworkers, and the preservation of the public interests in law enforcement, peace and order.

It seems to be the Board's contention that, although all these things are true, and although it deliberately laid them before the Court, and induced the Court to consider them against the objections of the Steel Corporation (R. 120), the Circuit Court should have ignored everything in the stipulation, except the bare fact of demilitarization; and that its consideration of the other facts, and particularly of the fact that since demilitarization the police had been State peace officers, was an error which requires a reversal.

This contention is clearly forbidden the Board by the rule, as old and well-established as any rule of appellate practice, that a party who induces or contributes to an error in a subordinate Court, cannot later be heard to complain of the error in an appellate Court:

Memphis v. U. S., 97 U.S. 293 (1878);
Law v. U. S., 266 U.S. 494 (1925);
Mercelis v. Wilson, 235 U.S. 579 (1915).

Apparently in an attempt to avoid the force of this rule of estoppel, the Board contends that the status of the Otis Works policemen as municipal police of the City of Cleveland should have been called to the Board's attention at its hearings of April 8, 1943 (R. 2) and September 28, 1943 (R. 41). No such contention was advanced in the Circuit Court, until after it had handed down its second decision of the case—that now under review. The argument is evidently an afterthought.

In order to make it, the Board seeks to find in the record, by an inconsistent and anomalous use of the stipulation itself, evidence that the municipal police status of the Otis Works policemen existed in 1943. But that is not the fact, and no such fact is asserted in the stipulation or elsewhere in the record. The facts are known to the policemen and the Union, and by this time they should be known to the Board.

For years before August 5, 1942, the Otis Works policemen held commissions as members of the municipal force in Cleveland. During the period of their enrollments as auxiliary military police, from about August 5, 1942, throughout 1943 when this case was pending before the Board, and until the demilitarization of May 29, 1944, although they continued to do the work of peace officers (R. 6; 117), their municipal commissions were withdrawn. In the order of demilitarization it was made clear that this change of their military status was intended to work no change in the duties of the plant police (R. 117-118); and in keeping with this sugges-

tion and the Company's own policy of many years, the Cleveland city police commissions were thereupon revived, as described accurately in the stipulation (R. 115-116). In short, as the municipal police status did not exist in 1943, the Company could not have shown (and it was not called upon to speculate), at hearings held in 1943, that it might be revived in 1944.

The real question to be considered concerning the use of the stipulation, while the case was pending in the Circuit Court, was that raised by the Steel Corporation, under the rule in *N.L.R.B. v. Newport News Shipbuilding Company,* 308 U.S. 241 (1939)—the question whether, in such a case, the reviewing Courts may consider any fact not disclosed in the Board's transcript. If the new fact of demilitarization was, subject to this rule, entitled to any consideration by the Circuit Court, it was only because, under the rule of such cases as *U.S. v. Swift & Co.,* 286 U.S. 106 (1932), a federal appellate Court—or any Court of equity—has the power to adjust or adapt its disposition of any particular case to meet changing or changed conditions.

This rule undoubtedly applies to enable the Circuit Courts of Appeals to enter proper decisions in review proceedings under the National Labor Relations Act; in cases, for example, in which a Board order, valid when made, has been made invalid, or useless, or wholly inequitable, by circumstances arising later:

Indiana Quartered Oak Co. v. F.T.C., 58 Fed. (2d) 182 (2 C.C.A., 1932);

Century Metalcraft Co. v. F.T.C., 112 Fed. (2d) 443 (7 C.C.A., 1940).

It is gravely doubtful, however, that, even were the facts as the Board supposes in its brief, the Board could maintain the converse proposition upon which it must rely here: the proposition that an employer, erroneously found guilty of an unfair labor practice by an invalid order of the Labor Board, based upon insufficient evidence, can be held guilty and commanded to obey the order by a Circuit Court, in reliance upon the Court's knowledge of new facts which appear to establish his guilt. It is submitted that this proposition is condemned by the principle of *N.L.R.B. v. Newport News Shipbuilding Company, supra;* and that, under such circumstances, the Board must seek a remand of the case, hold a new hearing, and so give the respondent employer his constitutional opportunity to answer or explain the newly-alleged facts.

And at all events, if the Board had the right to lay any new, relevant fact before the Circuit Court, then the Court was entitled to know also the related relevant facts. If the fact of demilitarization was open to consideration, the Circuit Court was entitled to know and to consider, as it did, what status was assumed by the Otis Works policemen after their demilitarization. It was not required, by any rule of law, to suppose, quite erroneously (R. 118), that upon the termination of their military status the Otis Works policemen ceased to occupy positions of any importance to the Steel Corporation's security, or to that of the public. It was not bound, that is, to decide the case finally in ignorance of the facts, and in blindness to the interests of the parties. It is fair to observe that the Board recognized this, when it made a stipulation disclosing all the facts, and laid it before the Circuit Court.

2. *And at all events, the question of procedure raised by the Board is of no controlling importance in the case.*

If the two decisions of this case by the Circuit Court be read together, it will be perceived that in its view of the law the status of the policemen under the National Labor Relations Act was not controlled by the fact that they were or were not auxiliary military police. Instead, both decisions were controlled by the Court's conclusion that, under the Act, no single labor union can be qualified to command recognition as exclusive representative of both the rank and file laborers in a large steelworks, and also of a class of individuals (whatever be their military or municipal or other official status) who are necessarily relied upon by management and the public to enforce company rules and public laws, *inter alia* against the rank and file.

This principle, so accepted by the Court below, rested upon its interpretation of the scope of the Labor Board's powers and responsibilities under the Act. If the Court's interpretation was right (a proposition shortly to be argued in this brief), it applies with the same force to non-military municipal policemen as to auxiliary military policemen. It applies, for that matter, to the members of any class of individuals who do work and discharge functions which are similar to those of the Otis Works police in these two respects: that they are functions which must be discharged if the enterprise is to operate, and that they must involve the exercise of managerial authority or public authority, in proper cases, over the rank and file who control the union. And if the Court's interpretation was wrong, it is equally

wrong in its applications to military and non-military police, or to Company officers or foremen or any other agents of management. From all these things (and in the peculiar circumstances of the whole matter), it must follow that the case neither requires nor calls for a decision of the questions of practice, procedure and jurisdiction raised by the Board's brief.

II. Under the National Labor Relations Act, the Labor Board cannot command that a Union, which is qualified as exclusive representative of the rank and file steelworkers in a large steelworks, shall be recognized at the same time as exclusive representative of plant police who represent management and the public in the exercise of control over the rank and file.

1. *The Board has, until very recently, recognized its duties, under the Act, to limit union organization at the line between labor and management, and to forbid the representation of agents of management by rank and file unions.*

At the present time, no question arising under the National Labor Relations Act appears to call more pointedly for wise settlement than does the question raised by this case: To what extent does the Act provide for the compulsory recognition by employers, of labor unions which desire to represent industrial policemen, or foremen, or other agents of management?

This question is presented in another case, argued before this Court during the present term, but not yet decided: *Packard Motor Car Co. v. N.L.R.B.* It is involved in numerous other cases now pending in the lower Courts, and before the Labor Board, and it has been the

subject of the most exhaustive consideration and study, during the present session of Congress, in the Houses of that body and elsewhere.

It is a question which did not exist, in any material way, when the National Labor Relations Act became law, or for years thereafter. In the wave of union organization which was encouraged by the Act, it was taken for granted by employers, by working people and by union leaders, that "labor" was one thing and "management" another; and that every true labor union must exclude representatives of management from its membership, from any part whatever in its internal affairs, and from all of its other functions: it was taken for granted, in other words, that management's contacts with union labor should be at arm's length.

From 1935 until about 1941, in case after case, the Board accepted this view, and in its descriptions of "appropriate units" in election cases, carefully drew the line so as to include within union jurisdiction only the classes of employees traditionally regarded as "labor," and to exclude all persons who were recognized to be representatives of management in its dealings with labor.

This general assumption, during a period of years after 1935, that the Act contemplated the preservation of a line between union labor and non-union management, is significant now because it explains the omission from the Act of any language specifically adapted to settle such questions as that presented here. If, as the historical facts show, everybody concerned in the matter in 1935 knew or thought he knew the boundaries between union labor and non-union management, it is not surprising that Congress saw no reason to define them.

In its Second Annual Report to Congress and the President, that for the fiscal year ended June 30, 1937, the Board showed that, from its beginnings (in the case of the *United States Stamping Co.*, 1 N.L.R.B. 123 (1936)), it had taken for granted the necessity that all regular representatives of management, in its dealings with the rank and file of labor, must be excluded from the jurisdiction of rank and file unions. The Board said (p. 136):

> "The exclusion of supervisory employees from bargaining units composed of ordinary employees is based on their connection with the management, with which collective bargaining is to take place. The extent to which foremen and subforemen come within this rationale is often the subject of dispute. The criteria which have been used by the Board in deciding issues of this kind may be seen in two cases involving subforemen. In *Matter of R. C. A. Manufacturing Company, Inc.*, it was agreed by all of the parties that foremen should be excluded from the appropriate unit, but one of the participating unions contended for the exclusion also of certain working group leaders. The Board said:
>
> > 'These working group leaders, who may on occasion actually work on materials, possess authority to give orders to the employees under their supervision and to recommend disciplinary action to the foremen or assistant foremen. They are therefore to be considered as part of the supervisory force.'
>
> "In *Johns-Manville Products Corporation and Asbestos Workers' Union, Nashua Local, Affiliated with the Committee for Industrial Organization, The Independent Asbestos Workers' Association,*

and the American Federation of Labor, a similar situation was presented as to assistant foremen. The Board included them in the appropriate unit, saying:

> "It appears, however, that these employees have no right to hire or discharge and ordinarily are engaged directly on production. Their only distinguishing function is that they temporarily replace absent foremen. We think that their interests are closer to those of the ordinary, than to those of the supervisory, employees.'

"It is clear that the power to hire and discharge is not the sole criterion of what constitutes a supervisory employee. In *Matter of Consumers' Research, Inc.*, the Board excluded from an appropriate unit the personnel director of the respondent, 'who, despite her position, was not the final arbiter in the matter of tenure of employment.' The Board said:

> 'A personnel director is, *ipso facto*, intimately connected with management, and in a position to affect employment policies.' "

This view of the status, under the Act, of those in the management side of the labor-management line was reiterated in case after case (and in Annual Report after Annual Report) without modification until 1942. During that year, in the case of *Union Collieries Coal Company*, 41 N.L.R.B. 961 (June 15, 1942) and 44 N.L.R.B. 165 (September 18, 1942), the Board held that a union admitting to membership only supervisors, might be certified as exclusive representative of a group of such supervisors. This decision, however, signified no real change in the original rule; for it was, as the

Board made clear, controlled, *inter alia*, by the apparent independence of the union from any connection with any rank and file organization. The Board said (44 N.L.R.B. p. 169):

> "Our conclusion that the supervisory personnel involved in these proceedings are within the protection of the Act does not, of course, mean that an appropriate unit for collective bargaining purposes may include both supervisors and their subordinates. The Statute, (Sec. 9 (b)) expressly delegates to the Board the discretion to decide 'in each case' the unit appropriate for collective bargaining. In this case the supervisory personnel have formed and joined an independent union, unaffiliated with any parent organization."

The *Union Collieries* decision was never made effective: the "independent union" was shortly absorbed into the United Mine Workers of America; no effort was made by that organization to enforce acceptance of the Board's interlocutory findings; and no final order was ever made in the case. Instead, in less than a year, the Board overruled its own new doctrine, and reverted to its view that no labor union can, by the procedures provided by the Act, command recognition as exclusive representative of any group of representatives of management.

This was effected in the case of the *Maryland Drydock Company*, 49 N.L.R.B. 733 (May 11, 1943). The Board refused to permit the qualification of a rank and file union as representative of "lead men" and others, of the lowest grade of supervisors in a shipyard. The Board held (p. 740):

"The very nature of a foreman's duties make him an instrumentality of management in dealing with labor. The duty of supervision with which he is principally charged implies a delegation of authority with respect to the selection, promotion, and discharge of the workers in his section. Although the delegation of authority is no longer plenary in modern factories which have a central personnel system, there is no doubt that even the function of advising or recommending action with regard to personnel is sufficient to command respect and instill fear in the minds of subordinates. To hold that the National Labor Relations Act contemplated the representation of supervisory employees by the same organizations which might represent the subordinates would be to view the statute as repudiating the historic prohibition of the common law against fiduciaries serving conflicting interests.

(p. 741):

"The legislative history of the National Labor Relations Act indicates that the conditions which prevailed in the mass production industries were the primary factors which led to its enactment. In these industries it was traditionally recognized by all parties that the interests of foremen lay predominantly with the management groups. We are of the opinion in the present stage of industrial administration and employee self-organization, the establishment of bargaining units composed of supervisors exercising substantial managerial authority will impede the processes of collective bargaining, disrupt established managerial and production techniques, and militate against effectuation of the policies of the Act. To the extent that our

decisions in the *Union Collieries, Godchaux Sugar,* and subsequent cases are inconsistent with this opinion, they are hereby overruled. We accordingly find that the units herein proposed are not appropriate units for collective bargaining within the meaning of Section 9 (b) of the Act and we shall therefore dismiss the petition."

The Board took occasion to explain that it had determined to overrule the *Union Collieries* case, and to show that the supposed principle of that case was not a sound one: that nothing is to be accomplished in such cases by grouping, or attempting or pretending to group, the managerial agents in a "separate unit" from that of the rank and file, saying (p. 741):

"* * * Even in our earlier cases, the Board recognized the danger inherent in the organization of supervisors, and sought to protect the ordinary employees by refusing to sanction the establishment of bargaining units containing both supervisors and their subordinates. We are not convinced, however, that this measure affords adequate protection of the rights of the vast bulk of employees, whom the Act was specifically designed to protect. For, although supervisors may nominally constitute a separate bargaining unit, it is clear that they may—as they did in the case at bar—affiliate with and designate as their representative the same union which represents their subordinates."

Through 1944 the doctrine of the *Maryland Drydock Company* case—the traditional doctrine of all the cases from 1935 through 1941—was not shaken. See: *In re Soss Manufacturing Co.*, 56 N.L.R.B. 348 (May 8, 1944) and *In re Rochester etc. Coal Co.*, 56 N.L.R.B. 1760

(June 29, 1944). In the case of the *Packard Motor Car Co.*, 61 N.L.R.B. 4 (March 26, 1945), however, the Board changed its view again, and, as in the *Union Collieries* case, held that an independent union, devoid of any connection with the rank and file, could qualify as exclusive representative of certain foremen in an automobile manufactory; and then, on March 7, 1946, in another case, involving the coal mine supervisors of *Jones & Laughlin Steel Corporation*, 66 N.L.R.B. 386, broadened the new rule tremendously, by holding that a rank and file union, the United Mine Workers of America, may be qualified to represent the supervisors serving in union shop mines, regardless of the extent of the supervisors' responsibilities as agents of management.

Neither of these two decisions has become effective, or has, thus far, settled the law. The *Packard Motor Car Company* decision is now under review here, as is stated above; and the Board's final order in the *Jones & Laughlin Steel Corporation's* mine supervisors' case, entered on December 30, 1946, is under review in the Third Circuit Court of Appeals. In both cases, one member of the Board dissented strongly against each of its opinions. In the *Jones & Laughlin* case, the Board recognized the difficulty of its new rule, but declared its conclusion that, since the Act contains no words specifically empowering it to do so, it cannot (in cases involving the foreman question, at least) limit or deny the right of any individual in industry to be represented by any union he chooses, or the right of any union to extend its jurisdiction, under the Act, to cover any "unit" in which it is able to win a majority of the eligible voters (66 N.L.R.B. p. 398):

> "The Board has already found that these foremen are 'employees' within the meaning of the Act.

(Section III, *supra*, and cases cited therein.) We think that this is largely dispositive of this case. The Act contains no specific language empowering the Board to disqualify a freely chosen, legitimate labor organization, not company dominated, as the collective bargaining representative of persons already found to be 'employees' within the meaning of the Act.

(p. 399):

"The Act guarantees to all employees the right to bargain collectively 'through representatives *of their own choosing.*' Unless, therefore, certification of a bargaining representative freely selected by a given group of employees in an appropriate unit would be contrary to the policy of the Act, this Board cannot and should not refuse to honor the employees' choice. That policy appears in the preamble: 'It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining* and by protecting the exercise by workers of full freedom of association, self-organization, and *designation of representatives of their own choosing,* for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.' (Emphasis supplied.)"

In the same opinion, the Board suggested that, should its new rule seem offensive to the underlying policies of the Act, in its effects upon industry and upon labor unions, the remedy must be in Congress, if the Board's

new interpretation of the Act is otherwise correct; or, of course, in the Courts, if the new rule be incorrect:

(p. 403):

"The Board reaches this conclusion with full realization of the difficulty and the importance of the policy considerations involved. We conclude, despite the weight that should be attached to the arguments—some real and some speculative—adduced in favor of our refusing to apply the Act to these employees, that it would be an abuse of discretion for us to follow that course. The Act, as written today, requires that we protect the right of employees to bargain collectively through representatives of their choosing, not of our choosing. So long as the Congress of the United States imposes no limitation upon their choice, it is not for us to do so."

2. *The new rule of law, recently established by the Board and presented here, differs from the new rule presented for consideration by the Packard Motor Car Co. case; now under advisement by the Court.*

It is to be observed that in the Board's decision of the *Packard Motor Car Company* case, now under review by this Court, the Board held: (1) that under Section 7 of the Act, all "employees" have the rights to "form, join or assist labor organizations," and "to bargain collectively through representatives"; (2) that the term "employee" is given a definition in Section 2 (3) of the Act which includes foremen—and also all other individuals representing management, including corporate officers and directors; and (3) that it must

follow that, under the Act, foremen, as "employees", have a legally enforceable right to bargain through unions, provided only that the unions chosen by the foremen are not those which represent their rank and file subordinates. By this new rule, the Board abandoned much of the reasoning set out in its opinion in the *Maryland Drydock Co.* case, and perhaps overruled that decision in part—though only to the extent that it had overruled the *Union Collieries* case. But this left the rule of the *Maryland Drydock Company* case—that of the Board's earliest cases, described in the Second Annual Report, largely intact, in a formal if not a practical sense, because it did not abolish the principle that no rank and file union can qualify to represent foremen or other agents of management.

In the *Jones & Laughlin* coal mine case, however, the Board carried its new belief in the literal interpretation of Sections 2 and 7 of the Act much further, and pushed the new doctrine to an extreme new limit, by holding that (1) under Section 7 all "employees" have the rights to form, join, assist or bargain through representatives "of their own choosing"; (2) that under a literal reading of Section 2 (2) (as has been observed) every paid representative of management is an "employee"; and (3) that it must follow from (1) and (2) that every foreman, or policeman or corporate officer or other paid agent of any employer has rights under the Act, which the Board cannot deny but which it must on the contrary enforce, to form, join and assist any labor organization he chooses, and to be represented by any union he, and a majority of the others in an "appropriate unit" may choose, no matter what its other relationships and responsibilities to rank and file labor may be. By this step, the Board abandoned every pre-

existing limitation upon the scope of union jurisdiction, and overruled not only the *Maryland Drydock Co.* case, but all of its other earlier cases and doctrines. The resulting rule is so new, and so different from anything which went before, that this present case has become, in this Court, a case of first impression.

It will be seen that the basic question here is not the same which has been presented in the *Packard* case. In *N.L.R.B. v. Packard Motor Car Co.*, 157 Fed. (2d) 80 (August 12, 1946), the decision under review in this Court, the Sixth Circuit Court of Appeals outlined the distinction. It upheld the Board's order only because the Union certified as representative of the Packard Company's foremen was (so the Board had found) wholly independent of the Union or Unions representing the Packard rank and file. Referring to its two earlier decisions which this present brief is intended to sustain, the Circuit Court said (157 Fed. (2d) 86):

> "Since the union involved is independent and neither a part of nor controlled by the union representing the production workers, we also uphold the decision as to the propriety of the exclusive bargaining representative named by the Board. This is a situation diametrically opposite to that presented in Jones & Laughlin Steel Corp. v. National Labor Relations Board, supra, where the bargaining agent designated was the identical union which represented the production workers. As found by the panel of the War Labor Board, it is not appropriate for supervisors 'who are responsible for discipline, assignment of work, rate adjustments and promotions, who represent the employers in handling grievances of rank and file

workers, and who generally represent higher management in dealing with the rank and file workers, to be subject to discipline by a union which is controlled directly or indirectly by the men whom they supervise. The effectiveness of management requires that it have its own uncontrolled agents to represent it in dealing with the rank and file, just as the rank and file are entitled to have their own uncontrolled representatives for dealing with higher management.'

"So far as the present designation is concerned, it leaves the foremen uncontrolled agents in dealing with the rank and file, and no reason appears to anticipate that the independence of the Foreman's Association of America will in the immediate future be destroyed."

3. *By its reliance upon a literal reading of the Act, to support a wholly new interpretation, the Board has ignored the applicable canons of statutory interpretation.*

(a) THE CANON PREFERRING A REASONABLE OVER A LITERAL CONSTRUCTION.

It is a rule of statutory construction, applicable to all general statutes and with particular force to such remedial acts as the National Labor Relations Act, that the judicial, executive or administrative authority who puts a statute into effect must always interpret it as a whole, and in such manner as to accomplish its purpose, and that he must never adopt a literal reading of some phrase or section, if such a reading will produce a result which is not in accord with the general pur-

pose, or which is for any other reason unreasonable or iniquitous.

Church of the Holy Trinity v. U. S., 143 U.S. 457 (1892) is the leading case. This Court held that the Act forbidding any alien to enter the United States for the purpose of performing a contract to furnish labor or service of any kind, could not be applied to condemn the entry of an alien minister of the Gospel, who had contracted to serve as such in a New York church. The Court said (p. 458):

> "It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. * * * While there is great force in this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

Within a little more than a year past, *Church of the Holy Trinity v. U. S.* has been cited by this Court at least twice, as an illustration of the proper method of interpretation of federal statutes:

Markham v. Cabell, 326 U.S. 404 (1945) and
U. S. v. Carbone, 327 U.S. 633 (1946).

Perhaps a hundred other decisions of this Court could be cited, as authorities similarly condemning the method of literal reading as a means of interpreting written laws. A literal reading is never correct, if it produces an absurd or apparently unforeseen and undesired result. The Labor Board's literal readings of the Act, in other connections, have often been condemned; for example, in:

N.L.R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939); and
Southern Steamship Co. v. N.L.R.B., 316 U.S. 31 (1942).

And yet, it was only by a literal reading of Sections 2 and 7 of the National Labor Relations Act that the Board reached its conclusion, explained in the *Jones & Laughlin Steel Corporation's* coal mine case, that it must accord to rank and file unions an enforceable legal right to represent the supervisors of the rank and file. The Board's conclusion could have been reached in no other way. It had no historical background to recommend it. That its application might involve consequences not foreseen by Congress, wholly undesirable in general, and likely, in particular, to defeat important purposes of the Act, are matters shortly to be argued, and which the Board conceded. But the Board gave no consideration to the effect of these circumstances, as a matter of law,

to forbid its literal interpretation or to cast doubt upon the soundness of its new rule. Instead, it seems, it simply ignored the established canon.

(b) THE CANON WHICH HAD GIVEN AN ALMOST CONCLUSIVE PRESUMPTION OF CORRECTNESS TO THE BOARD'S OWN LONG ESTABLISHED, CONTRARY INTERPRETATION.

The Board's opinion in the *Maryland Drydock Co.* case is important here. It sets forth fully the reasoning which supported the Board's original rule, the rule which held that the Act does not contemplate nor permit the compulsory recognition of any one labor union as the exclusive representative of both rank and file laborers and their supervisors. It did not, however, make any change in the Board's previous holding on that point of law. Instead, as has been observed, it merely applied a rule which had been adopted by the common consent of all concerned when the Act was passed; carefully considered and reaffirmed from year to year thereafter, in the Board's decisions and in its Annual Reports, made to Congress under Section 3 of the Act; and upheld and applied on those occasions in which any litigant before the Board had questioned it. The only doubtful point of the rule, during a period of more than ten years, before and after the *Maryland Drydock Co.* case and prior to the Board's latest decisions, was that involved in the *Union Collieries* case and the *Packard Motor Car Company* case, concerning the power of a union unaffiliated with the rank and file to represent supervisors and other managerial agents.

In the decisions by which it attempts to establish the new rule, that any rank and file union may be qualified under the Act to represent any group of supervisory

officials, the Board has given no weight to the legal consequences of its long adherence to the original rule. But the history of the original rule cannot properly be ignored in this manner. Instead, under a well-known canon, the construction placed upon the Act in the beginning by the Board; almost always accepted, during a period of many years, by labor and industry alike; successfully defended on those occasions when it was subjected to attack in litigation before the Board; and explicitly described and explained to Congress in the Board's Annual Reports, is almost certainly a correct construction. It is under no circumstances to be disturbed unless, at last, it is shown to have been the result of plain error. It is "entitled to great weight and will be rejected only in cases of apparent error":

Davis v. Department of Labor, 317 U.S. 249, 256-7 (1942); and see

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

The effect of this canon of construction is greatly strengthened where Congress has been informed, as it was here, by the Board's Annual Reports and by the almost continual discussion of this Act, of the meaning which has been attributed to its language. In these circumstances, it must be, and always is presumed that had the Board's original estimates of its own powers and the limits of union jurisdiction under the Act been wrong, Congress would have corrected the errors by amending the Act long before 1945 or 1946, when the Board changed its view of the meaning of the Act.

U. S. v. Midwest Oil Company, 236 U.S. 459 (1915) is one of many cases establishing that proposition. Over many years, the Presidents by Executive Orders

"withdrew" from the tracts of public lands, made available by various Acts of Congress for settlement by private owners at nominal cost, those portions believed necessary for other, more important public uses. This practice was made known to Congress by a Presidential report, in 1902. In 1910, certain individuals claimed a tract of oil land which they had occupied and developed under authority of an Act of Congress passed in 1897, but in disregard of an Executive "withdrawal" which had occurred several months before. Their title was held bad: Congressional acquiescence in the Presidents' practice supplied the absence of any express grant of the power to "withdraw," in the Act of 1897 or otherwise (p. 481):

> "* * * Congress, with notice of this practice and of this claim of authority, received the report. Neither at that session nor afterwards did it ever repudiate the action taken or the power claimed. Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress."

The parallels with this case are obvious. Congress had repeated notices of the Labor Board's assumption, from 1935 until 1946, of the existence of its power and duty, under the Act, to draw the line between union labor and non-union management, and to forbid the representation of the agents of management by labor unions qualified to represent the members of the rank and file of labor. Congress never repudiated the action taken by the Board, nor questioned the power claimed by the Board. The doctrine of Congressional acquiescence clearly applied, under the legal canon of con-

struction; and yet the Board, instead of applying it, has ignored it, as it did the other canon which has been considered.

4. *The Board's new rule, abolishing the line between non-union management and union labor, would subvert instead of effectuate the policies of the Act.*

(a) THIS IS A TEST OF THE VALIDITY OF EVERY ORDER OF THE BOARD.

Under Sections 9 (b) and 10 (c) of the National Labor Relations Act, every decision of the Board in an election or "representation" case, and every final order of the Board in an "unfair labor practice" case, must, if it is to be valid, be reasonably calculated to "effectuate the polices of the Act."

This test of the validity of the Board's "Certifications of Representatives" in election cases arising under Section 9 was recognized by the Court in *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, p. 165 (1941). As the principal test to be applied to cases arising under Section 8 of the Act, and to the Board's final orders, made in such cases under Section 10 (c), it is established by the express words of the latter section, and has been so recognized in every case in which the question has arisen. The Board is not required to prosecute every charge of unfair labor practices which is laid before it. When it does choose to prosecute, it is not, it seems, required to enter any final order. But when it does enter a final order in any such case, its order must be such that its execution by the parties will tend to accomplish the purposes of the Act; if otherwise, the order is invalid and unenforceable.

This rule is illustrated by the decisions of the lower Courts in this case and the companion *Atkins* case (*N.L.R.B. v. E. C. Atkins & Co.*, 147 Fed. (2d) 730 (1945) and 155 Fed. (2d) 567 (1946)), and in substantially every case in which this (or any other Federal Court) has set aside any final order of the Board. The Board will not deny its existence or validity.

(b) THE BOARD'S NEW RULE WOULD VIOLATE THE PURPOSE OF THE ACT TO MAINTAIN THE FREEDOM OF RANK AND FILE UNIONS FROM ANY INFLUENCE BY REPRESENTATIVES OF MANAGEMENT.

By its process of literal interpretation of the Act, which has been described, the Board reached the conclusion that every "employee," including every foreman, policeman or other representative of management, has been guaranteed the rights, which the Board cannot deny, to "form, join or assist labor organizations" and to bargain through any labor organization, "of his own choosing."

This conclusion is indispensable to every argument advanced by the Board in support of its new rule—it is, indeed, an explicit statement of one of the two phases of the new rule. But it will be shown an absurdly incorrect conclusion, if its logical results be analyzed, and tested by the rule that every valid Board order must tend to effectuate the purposes of the Act.

It has long been settled, directly to the contrary of the conclusion embodied in the Board's new rule, that the purposes of the Act require that those who represent management in its dealings with labor shall be *denied* any right to form, join or assist any labor union

which either represents or may at any future time represent, or claim to represent, any group of their subordinates in the rank and file. Every such representative of an employer, whatever his rank or position, is himself the "employer" under the definition contained in Section 2 (2) of the Act, and as such he is, again contrary to the Board's conclusion, *forbidden,* by Section 8 (2):

> "* * * to dominate or interfere with the formation or administration of any labor organization, or contribute financial or other support to it."

That this result, the opposite of the enlistment in unions of foremen, policemen and others exercising the authority of management, was one of the principal purposes of the Act, is a view which has been entertained from the beginning by this Court, and long since recognized by every subordinate authority. This point was settled here in

N.L.R.B. v. Pennsylvania Greyhound Lines, 303 U.S. 261 (1938). In that case, the supervisory representatives of the respondent employer had, the Board found, taken active parts in the formation prior to 1935, and in the administration later, of an Association of all of the employees. The purpose of the Association was to provide means for collective bargaining and the peaceful adjustment of employee grievances. In a proceeding commenced by a rival organization under Section 10 of the Act, the Board held that the Association must be disestablished, principally because of the participation of the supervisory agents in its affairs. Such a decision of the case, the Court held, was required to accomplish the purposes of the Act. The Court outlined the

purpose of Congress to draw a line between management and union labor (p. 266):

> "Before enactment of the National Labor Relations Act this Court had recognized that the maintenance of a 'company union,' dominated by the employer, may be a ready and effective means of obstructing self-organization of employees and their choice of their own representatives for the purpose of collective bargaining. Section 2 (3) of the Railway Labor Act of 1926, had provided that representatives, for the purposes of the Act, should be designated by employer and employees 'without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.' * * *
>
> "Congress, in enacting the National Labor Relations Act, had in mind the experience in the administration of the Railway Labor Act, and declared that the former was 'an amplification and further clarification of the principles' of the latter."

—and held that one of the principal purposes of the Act was to prevent any participation in union affairs by those on the management side of the line (pp. 267-268):

> "* * * To secure to employees the benefits of self-organization and collective bargaining through representatives of the employees' own choosing, the Board was authorized by § 10 (c) to order the abandonment of unfair labor practices and to take affirmative action which would carry out the policy of the Act.
>
> "* * * The report of the House Committee on Labor on this feature of the Act, after pointing out that collective bargaining is 'a sham when the employer sits on both sides of the table by su-

porting a particular organization with which he deals,' declared: 'The orders will of course be adapted to the need of the individual case; they may include such matters as refraining from * * * bargaining with an organization corrupted by unfair labor practices.' Report of the House Committee on Labor, *supra*, pp. 18, 24.

"It is plain that the challenged provisions of the present order are of a kind contemplated by Congress in the enactment of § 10 (c) and are within its terms."

Of all of the unfair labor practice cases which have been prosecuted by the Board since 1935, a large and perhaps a major fraction have been intended, at least in part, to accomplish the purpose of the Act described in the *Pennsylvania Greyhound* case, by making it certain, in so far as the Board can make anything certain, that no rank and file labor union shall be influenced, or assisted, or subject to any participation in its internal affairs, by any representative of management. It has long been established that, far from having any right to "form, join or assist labor organizations," the representatives of management must maintain the strictest aloofness and neutrality towards the unions which represent their subordinates; and that any failure in this duty, on the part of any such representative of management, whether authorized or not, must be imputed against the employer. A fair statement of the settled rule appears in

Solvay Process Co. v. N.L.R.B., 117 Fed. (2d) 83 (5 C.C.A., 1941). In this case, two foremen—in "the front line of management," expressed views in opposition to a C.I.O. union to certain of their subordinates,

and spoke in favor of another organization. Of this the Court held (p. 84):

> *"Hurt and Hargroder were recognized by the manager of the company as occupying supervisory capacities as a part of the management, and, as such, constrained to remain aloof from and neutral to any organization activities of the employees.* Although the consistent policy of the company, as repeatedly announced by its proper officials, was to comply with the provisions of the National Labor Relations Act by permitting its employees to organize a labor union and to bargain collectively through representatives of their choosing without interference, restraint, or coercion from the management, and, *although the actions of the foremen were contrary to the orders of the company manager and to the express policy of the company, there is no doubt that they constituted unfair labor practices by the employer."* (Italics supplied)

In *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514 (1941), this Court explained that the rule so declared in *Solvay Process Co. v. N.L.R.B.* is based not upon any doctrine of agency, but upon the fact that, to accomplish the purposes of the Act, the sharp line between non-union management and union labor must be maintained and observed, and every regular representative of management must be required to hold himself aloof from and neutral to all activities of unions of the rank and file (p. 521):

> "The question is not one of legal liability of the employer in damages or for penalties on principles of agency or respondeat superior, but only whether the Act condemns such activities as unfair labor practices so far as the employer may gain from them any advantage in the bargaining process

> of a kind which the Act proscribes. To that extent we hold that the employer is within the reach of the Board's order to prevent any repetition of such activities and to remove the consequences of them upon the employees' right of self-organization, quite as much as if he had directed them."

In drawing the line between management and labor, which is required to effectuate the purposes of the Act, this Court and the other Courts have always accepted the traditional view reflected in the passages from the Board's Second Annual Report which are quoted above. Any individual who regularly expresses or exercises the authority of management over the rank and file, however subordinate his station in the hierarchy of management, is on the management side of the line; and every such individual must be restrained, by superior authority if not by his own inclinations, from any act or utterance which influences the success or failure, or which involves him in any of the internal affairs, of any rank and file union. This is established in the cases just cited; in

International Association of Machinists v. N.L.R.B., 311 U.S. 72 (1940);

N.L.R.B. v. Link Belt Company, 311 U.S. 584 (1941);

—and in scores of other decisions.

This principle, of course, condemns utterly the Board's new idea that corporate officers and foremen and policemen and other representatives of management have rights under the Act to form, join, assist, and be represented by, rank and file unions. The two interpretations of the Act cannot coexist in practice. Instead it must follow from the cases just cited that the agents

of management are not subject to be represented, under the Act, by rank and file unions; for it has been settled (and it is an inescapable implication of the Act) that all those who *are* subject to union representation under the Act, must be free to join or assist unions of their own choosing, which are eligible to represent them, or, on the other hand, to refuse to join and to oppose and condemn unions of which they do not approve. These are amongst the rights which the Act was principally intended to assure to the classes of employees for whose benefit it was enacted. In

Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197 (1938), the Court said (p. 238):

> "* * * The Brotherhood and its locals were entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act."

(c) THE BOARD'S NEW RULE WOULD VIOLATE THE PURPOSE OF THE ACT TO AVOID ANY UNNECESSARY IMPAIRMENT OF THE FUNCTIONS OF MANAGEMENT.

It is made plain by the cases discussed in the preceding section of this brief that Congress must have intended that the Labor Board should maintain the line between management and labor; encouraging the formation and support of unions by those on the labor side of the line, and forbidding and preventing the formation, domination or assistance of those unions by persons on the management side. As these cases show, the kind of

rank and file unions contemplated by the Act could not exist or function, were they to be subject to either the support of management or its agents, or to their active opposition.

That is, however, but one phase of the rule requiring the maintenance of the line between management and labor, and forbidding to representatives of management the rights to join (or be represented under the act by) those unions which undertake to represent the rank and file. It has long been recognized that the rule has another phase, and that there is at least one other reason why rank and file unions must, to accomplish the purposes of the Act, be denied legal qualification as exclusive representatives of foremen and others on the management side of the line.

The Board has always recognized this second branch of the rule. Prior to the formulation of the new doctrine of the *Jones & Laughlin Steel Corporation* coal mine supervisors' case, the Board declared in case after case that the Act was not intended to destroy but was intended to preserve such well-established relationships between management and labor as, for example, that which made it the traditional duty of the foreman, in matters involving any conflict between the respective interests of employer and employee, to maintain a single-minded loyalty to the employer.

In *re Soss Manufacturing Co.*, 56 N.L.R.B. 348 (1944), the Board summarized its position concisely. Speaking of cases, real or supposed, of the kind in which some rank and file union had sought to become exclusive representative of supervisors, the Board said (p. 351):

> "* * * Moreover, the very existence of this situation tended to disrupt well-established rela-

tionships between management and labor. The express purpose, of course, for which foremen and other supervisory officials are hired, is to represent management in its dealings with production workers. In such situations, management is, of course, entitled to the undivided allegiance of the foremen, which implies such foremen being free from the orders and directions of organizations composed primarily of subordinate employees."

And in *re Rochester and Pittsburgh Coal Company*, 56 N.L.R.B. 1760 (1944), the Board reaffirmed its traditional rule, and described the two phases now under discussion here, saying (p. 1764):

> "* * * *The Maryland Drydock* and *Soss* cases, taken together, clearly condemn the representation of ordinary employees and supervisory employees by the same labor organization, both because of the inherent threat to the freedom of choice by ordinary employees and because of the irreconcilable and conflicting positions in which such affiliations would place supervisors."

Although the Board has recently abandoned it, or ignored it, the principle of the decisions of the *Soss* and *Rochester and Pittsburgh Coal Company* cases undoubtedly reflected a sound and correct interpretation of the Act. As has been observed, it is to be doubted that, when it passed the Act, Congress foresaw the precise problem under study in this case; for Union organization of any of the traditional representatives of management was unheard of in 1935, in the industries to which the Act is peculiarly adapted. However, it is certain, as is shown by the decisions cited in the preceding section of this brief, that Congress did intend to maintain the

existing, traditional distinctions between labor, represented by unions, and management, dealing with labor and with unions through non-union agents. And the success of this purpose of the Act, or of any other project based on the same premises of social organization, necessarily required in 1935, and still requires today, the existence of managerial agents who are not subject to the control of their subordinates, or to the control which might be exercised over them by any union qualified as their exclusive representative, but dominated by the rank and file.

Putting the same thing another way, the Act was not intended to result in any destruction of efficient managerial authority or in any other consequence similarly undesirable in a civilized, industrial society; and it was intended, on the other hand, to require the Board, among other things, to avoid such undesirable results in the enforcement of the Act. The general principle which operates here is explained in

Southern Steamship Co. v. N.L.R.B., 316 U.S. 31 (1942), a case in which a shipowner discharged certain seamen who had, while their ship was safe in port, engaged in a strike, in violation of their duty of obedience under the maritime law; the Board had ordered their reinstatement; and the Court was called upon to review the Board's order. Under a literal construction of the Act, the order was clearly within the powers of the Board; and it was well calculated, also, to effectuate the purpose of the Act to encourage the processes of collective bargaining. This Court, however, set the order aside, holding that its tendency to accomplish this one express purpose of the Act could not justify it, because it tended also to defeat the equally important policy,

declared in other laws and implied in this Act, which requires the maintenance of the traditional discipline of seamen. The Court said (p. 47):

> "* * * It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.
>
> "* * * While we have no doubt that the danger to the vessel was considerably less than it would have been had the strike occurred at sea, we have already indicated that it was certainly present and that considerations other than immediate danger to the ship require maintenance of discipline throughout the voyage."

The principle of the *Southern Steamship Company* case is a broad one. It is not to be restricted in its application to cases in which it deprives of the right to reinstatement employees discharged for violations of federal laws, or of state laws (*N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939)), or for violations of their duty to conform to proper discipline (*N.L.R.B. v. Williamson-Dickie Mfg. Co.*, 130 Fed. (2d) 260 (5 C.C.A., 1942) pp. 267-268), or for violations of their duty to avoid trespasses in the assertion of their demands (*N.L.R.B. v. Indiana Desk Co.*, 149 Fed. (2d) 987 (7 C.C.A., 1945) pp. 995-996). Instead, it is a gen-

eral principle limiting the Board's authority in every type of case, by requiring that it shall make no order which, though it may accomplish some purpose of the Act, will at the same time, and in a manner not specifically authorized by the Act and not intended by Congress, subvert some other rule of law or principle of public policy or social good. This is illustrated in

Phelps-Dodge Corp. v. N.L.R.B., 313 U.S. 177 (1941), a case in which this Court considered the validity of a "back pay" provision of a reinstatement order, made by the Board. During periods of wrongful discharge, certain employees had accepted other, temporary employment, while others had deliberately rejected opportunities to do so. In computing the back pay liability, the Board had credited the employer with the amounts actually earned in mitigation by the former class of employees, but had refused to consider any deduction whatever from the amounts owing those who had refused to work. This method the Board found a simple one, and it was calculated, of course, to discourage future violations of the Act. But it was nevertheless forbidden, because it encouraged idleness and subverted the public policy which favors industry. Of this the Court said (p. 198):

> "* * * Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred. To this the Board counters that to apply this abstractly just doctrine of mitigation of damages to the situations before it, often involving substantial numbers of workmen, would put on the Board details too burdensome for effective administration. * * *

"But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. (p. 200):

"* * * By leaving such an adjustment to the administrative process we have in mind not so much the minimization of damages as the healthy policy of promoting production and employment."

Beyond any question, the preservation of good management and of proper discipline in industry are socially desirable factors, which are respected and upheld by our state and federal laws in general. They must be preserved and upheld in an industrial society of the kind contemplated by the National Labor Relations Act, and if the purposes of the Act itself are to be achieved. The Act was, as its preambles declare, intended not to cripple or hamper private industry, but to stimulate it and encourage its prosperity. Its encouragement of the organizations of unions was a means to this end, and not an end in itself; and it was certainly not intended that the Act should, in its encouragement of unions, go so far as to destroy any socially necessary function of management.

And yet, if the declared *rationale* of the Board's new rule in such cases as this were to be accepted, and enforced in any real way as a correct interpretation of the Act, the functions of management would be greatly hampered and impaired, and possibly destroyed. The first duty of management is to manage. This it can do only through the loyal and efficient agency of individuals: corporate officers, foremen, industrial police and

all the other less important classes who have always represented management in its dealings with the rank and file who make up the body of union labor. It cannot continue to function as it has always functioned, if its agents in these dealings are required, in violation of the first and oldest principle of the law of agency, to divide their loyalty between it and the very members and representatives of the rank and file with whom they must deal.

(d) THE BOARD'S NEW RULE, IF APPLIED TO THE MILITARY OR MUNICIPAL POLICE WHO FIGURE IN THIS CASE, WOULD VIOLATE THE PURPOSE OF THE ACT TO AVOID ANY INFRINGEMENT OF THE PUBLIC INTEREST IN THE PRESERVATION OF LAW AND ORDER.

Under the rule of the Court's decisions of the *Southern Steamship Co.* and *Phelps Dodge Corp.* cases, the Board is forbidden to make any final order which, though calculated to effectuate some purpose of the Act, is likely to subvert or destroy, in a manner not contemplated by the Act, any interest of management which the law in general is intended to protect. Under the same rule, the Board is forbidden, with even greater force, to make any order which prejudices, in a manner not contemplated by the Act, any legally recognized public interest.

In the decision now under review here, *N.L.R.B. v. Jones & Laughlin Steel Corporation,* 154 Fed. (2d) 932, the Court below relied particularly upon this principle. This appears in the following passages of the Court's opinion (pp. 934-935; R. 121-122):

> "* * * The precise question here is not whether the plant guards should be permitted to organize, but whether the peculiar classification

into which they fall makes it improper for the Board to permit their organization by the same union which represents the production employees. As revealed by the stipulation, the plant guards, even though their military service has ceased, perform a service which in its public aspect is closely analogous to that of the military police. Under the statutes of Ohio, of which we take judicial notice, the plant guards are peace officers (§ 13432-1, General Code of Ohio), charged on behalf of the public with preventing injury to property, breaches of the peace and criminal offenses, including misdemeanors and felonies. * * * Counsel for the Board admits that the plant guards are part of the municipal police force and have and exercise the legal powers of police officers. During the year 1945 they not only made ordinary investigations of thefts, accidents, etc., on the respondent's premises, but they made arrests for major felonies.

* * * * * * *

"* * * Their functions and obligations therefore are of a dual character. They have a private obligation to their employer and an obligation to the community as sworn, bonded and commissioned police officers. In case of industrial unrest and strikes on the part of the production employees, the obligations of the plant guards to the municipality and state would be incompatible with their obligations to the Union which, since it represents production employees, authorizes and directs the strike.

"* * * We adhere to our conclusion that in the order involved here the Board failed to give

adequate consideration to the public welfare. A contrary conclusion would open wide the door to disorderly and criminal acts because of the limitation which the Board's order places on the power of the Government to furish adequate police protection."

These views involved nothing new. They were consistent, of course, with the rule of the *Southern Steamship Co.* case and of the *Phelps Dodge Corp.* case, and all the other related decisions of similar points. The court below cited and followed the most squarely parallel precedent:

N.L.R.B. v. Delaware-New Jersey Ferry Co., 128 Fed. (2d) 130 (3 C.C.A., 1942) in which the Circuit Court set aside a Board order which was intended to require that the owner of a line of steam river ferries should recognize a single labor union as the exclusive representative of both the licensed officers and the unlicensed seamen serving in his vessels. Condemning this order, the Court said (p. 137):

"The history of maritime employment shows the importance of the obedience of the sailor to his officers. This is necessary to maintain the safety of the ship, the cargo and the passengers, and it is true of a ferry boat though individual voyages are shorter. To group officers in command with employees who owe the duty to obey the commands in one bargaining unit seems to us to be dangerous.

"It is true that few, if any, of the licensed officers object to being included in a bargaining unit with the unlicensed personnel. This is not a controlling factor although it is one which we have con-

sidered. But the point here is not what the officers want, nor what the men want, nor what the company either wants or is willing to acquiesce in, but rather, what is the public interest. The Board's duty to serve the public interest cannot be affected by the desires or acquiescence of the parties."

The principle declared here was, as a little reflection will show, simply another application of the rule of the *Southern Steamship* and *Phelps Dodge* cases. In the decision of this case in the Court below, it was recognized as such, and the Court properly followed it. The public has an interest in the integrity of public peace officers at least equal to its interest in the integrity of the licensed officers of steam vessels; and the effects of representation by rank and file unions are the same in one case as in the other.

If the discharge of his duty requires it, the licensed marine officer must be prepared to deal with his subordinates with resolution and firmness. And similarly, if the discharge of his duty requires it, the peace officer who stands, sometimes alone, for law and order in a large steelworks, must be prepared to deal with every member of the public—which in fact means with the numerous members of the rank and file—with an equal or greater degree of resolution and firmness. If either officer is likely to fail in this function, in any matter of importance, he is worthless; and the public interest is in some degree lost. And yet it is a simple matter of common sense, that no marine officer and no police officer, having any human regard for his own welfare, can possibly be as free to exercise his authority against brother members of a rank and file union, as he can against others, to whom he bears no such relationship. If a labor union

dominated by the rank and file be qualified as his exclusive representative, such an officer must avoid the bad graces of the rank and file, for if his conduct of his office offends the rank and file, for any real or fancied reason, their union has the power to deprive him of his authority, his security and possibly his job. If any such retaliation is based upon the Union's conclusion that he has broken his vows of brotherhood to every other union member and of obedience to union laws (see p. 78, *infra*), he must become, during the Union's displeasure, a sort of outlaw, having no effective right or power, as an individual, to protect himself: see *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332 (1944).

5. *In the separation of non-union management and union labor contemplated by the Act, the police involved here must be classified as agents of management.*

In earlier sections of this brief (pp. 37-54, *supra*) are discussed the decisions of this Court and the subordinate Courts, and the other authorities, which have made it clear that, under the forms of industrial organization contemplated by the Act, the Board must distinguish management from labor, discourage either any intrusion into the affairs of rank and file labor unions by the agents of management who represent it in its dealings with the rank and file, and, finally, forbid any representation of such managerial agents by rank and file unions. In every such case as this, the application of these general rules calls for a classification, as management or as labor, of the individuals directly affected by the Board's decision. Here, for example, the question is: Are the policemen management, or are they rank and file labor?

In section 2 (2) of the Act is defined the term "employer"—the word used later in the Act to describe the kind of individual who must remain aloof from rank and file unions and their activities under Section 8 (2), and who cannot be represented by a rank and file union. The relevant part of the definition is as follows:

> "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, * * *"

Literal interpretation of this language is as improper as it is in the case of the definition of "employee" in Section 2 (3), for this "definition" of "employer," read literally, would probably describe every person who is an "employee" under the "definition" of that term; and the result would be an absurdity.

Therefore, in keeping with the canons of construction which have been discussed, instead of a literal interpretation, the Courts and the Board have always adopted the interpretation necessarily implied by the purposes of the Act, and have held that an "employer" —who can have no part in the affairs of rank and file unions—is "any person who acts in the interests of an employer, directly or indirectly" *in his dealings as such with the employer's rank and file employees.*

This definition, clearly implied in the Act, necessarily includes every agent, however high or low his station, through whom the authority of management is regularly expressed and imposed upon the rank and file of labor: upon those workers for whom the Act was intended to provide, and has generally provided, unions free from any influence by management. This was illustrated in an early case, which has already been mentioned:

International Association of Machinists v. N.L.R.B., 311 U.S. 72 (1940), a case in which the Court passed upon and upheld the validity of an order by which the Board had disqualified an A. F. of L. union as an aspirant representative of certain rank and file employees. The Board's order was based upon testimony that the union had received assistance, in its organizational efforts, from four supervisors or part time supervisors. The union, of which the four were regular members, objected strongly that their positions in management were unimportant (they were at most what the Board described as industrial "traffic cops" in its decision of the *Packard Motor Car Company* case), and that their activities in its behalf were within their rights as members of union labor. This argument would have been valid, were the Board's new rule under review here a correct one; were it true, that is, that every foreman is an "employee" and as such guaranteed the right to form or assist unions of his own choosing. But, adhering to the sound principles which have been discussed above, the Court rejected it, saying (p. 80):

> "* * * We are dealing here not with private rights (Amalgamated Utility Workers v. Consolidated Edison Co. 309 US 261, 84 L ed 738, 60 S Ct 561) nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence. * * * As we have said, Fouts, Shock, Dininger and Bolander all had men working under them. To be sure, they were not high in the factory hierarchy and apparently did not have the power to hire or to fire. But they did exercise gen-

eral authority over the employees and were in a strategic position to translate to their subordinates the policies and desires of the management."

Under this ruling (and it is only one of a multitude of decisions which establish the point) the Act places on the management side of the line between management and labor, any agent of management who regularly "exercises general authority over the employees"—which of course means over the rank and file, or who is regularly in a position in which he is enabled, and called upon, to "translate the policies and desires of the management" to the rank and file. Under this ruling, the participation by any such agent of management in the affairs of a rank and file union is forbidden by the Act, and destructive of the purposes of the Act.

Perhaps some industrial "watchmen," or even some employees who are called "police" do not fall upon the management side of the line here established; but it is certain that, under the rule of the *International Association* case and the others, the policemen at the Otis Works, who are involved in this case, are "employers" under the Act. They are regular agents of management, regularly exercising "a general authority over the employees," regularly charged with the duty "to translate the policies and desires of the management" to the rank and file, and when necessary to enforce them, in a way normally beyond the power of any other agency of management, against the rank and file.

There can be no dispute about the facts of this matter in this case. At the Board's original hearing in the case, the evidence on this subject included the following (R. 6):

"It must be borne in mind that these guards are charged with the responsibility for the protection of the physical plant and equipment of the Corporation. It is their duty to keep intruders out, to see that the rules and regulations of the Corporation are maintained within the plant for the benefit of all concerned, to see that the peace is kept, and to act as conservators of the legal rights of the Corporation.

"The duties of these guards do not differ greatly from the duties performed by members of a city, county or state police force. They do, however, have the additional responsibility of carrying out assignments of management which are very often of a confidential nature, and allegiance to management must be unquestioned.

"Any thing which might tend to be destructive to the discipline normally manifested in a guard force can have no other effect than weakening the plant protection system set up to effectively preserve and maintain industrial operations."

This was not contradicted. Instead, these things were necessarily accepted as facts of the case; and they were later included in the stipulation, laid before the Court below by the Board, in the following language (R. 115-116):

"5. When on duty, all members of the guard force are required to wear police badges, and uniforms of a military style, and they are armed with police revolvers and clubs or batons, and, when the occasion requires, with other arms and police equipment.

"6. The principal functions of the guard force include the following:

(a) To protect the real and personal property of the Corporation which is comprised by the Otis Works, and the property of employees and others in the Works, from any damage, injury, theft, or trespass, which might otherwise be caused by fire, storm or other casualty, or by any act of trespass, or sabotage, or other wrongful act.

(b) To maintain peace and good order at all times among all others employed in the Otis Works, by demanding and enforcing obedience to the safety and other rules of the Corporation, and to all applicable public laws and ordinances, and by preventing or arresting any violation thereof or any breach of the peace in or near the Works.

(c) To detect and if possible prevent any criminal act in or near the Works; to investigate and report, in confidence to their superiors, all crimes, suspected crimes, irregularities and casualties occurring in the Works; and to assist in the criminal prosecution of any person who may lawfully be charged to have committed or attempted any such crime."

From 1935 until 1942, in the cases which came before it, the Board invariably classified police officers having duties of the character so described in this record, as agents of management, who must be excluded from the jurisdiction of rank and file unions. They were given the same status for this purpose as the Board then gave to foremen and all other supervisory and managerial agents, and it made no difference whether they were the holders of municipal police commissions, or were purely private agents. Often, as was true in cases involving foremen, the Board's interpretation was approved by the unions. More rarely it was not. The decision was the

same in either event. For example, in the early case of *In re R.C.A. Manufacturing Co.*, 2 N.L.R.B. 159 (1936), the Board denied the request of a C.I.O. union that a small group of private plant guards be included in a large body of rank and file laborers, for which it desired to become the exclusive representative, saying (p. 164):

> "* * * The watchmen in the maintenance division, classified as guards by the Company and possessing a uniformed appearance, are a group obviously separate from the regular production employees. None of the above for the reasons stated should be included in the same bargaining unit with the production employees."

For years thereafter, in case after case, arising under Section 9, the "representation" section of the Act, the Board applied the same rule. Examples of this practice include the following decisions:

Burnside Steel Foundry, 7 N.L.R.B. 714 (1938);
Southport Petroleum Co., 8 N.L.R.B. 792 (1938);
Elliott Bay Lumber Co., 9 N.L.R.B. 3 (1938);
Ingram-Richardson Mfg. Co., 9 N.L.R.B. 200 (1938);
Inland Steel Co., 9 N.L.R.B. 783 (1938);
Southern California Gas Company, 10 N.L.R.B. 1123 (1939);
F. E. Booth Co., 10 N.L.R.B. 1491 (1939);
Automotive Maintenance Co., 13 N.L.R.B. 338 (1939);
Armour & Co., 13 N.L.R.B. 1143 (1939);
American Machine & Foundry Co., 14 N.L.R.B. 497 (1939);

Magnolia Petroleum Co., 18 N.L.R.B. 380 (1939);
Cleveland Hobbing Machine Co., 18 N.L.R.B. 412 (1939);
Todd-Johnson Dry Docks Co., 18 N.L.R.B. 973 (1939);
Armour & Co., 26 N.L.R.B. 1046 (1940).

And in unfair labor practice cases during the same period, the Board held, consistently with its practice in election cases, that industrial policemen were agents of management, and on the management side of the management-labor line. For example, in

Re West Kentucky Coal Co. and U.M.W.A., 10 N.L.R.B. 88 (1938); reviewed and enforced 116 F. (2d) 816 (6 C.C.A., 1940), the Board disestablished a labor organization, called the "E.M.B.A.," and held the employer in the case guilty of unfair labor practices, because the employer's private, industrial police had assisted the union so condemned and had been active opponents of a rival organization. The Board said (p. 105):

> "Working hand in hand with the E.M.B.A. in obtaining signatures to the cards reaffirming allegiance to the E.M.B.A., as described above, and in numerous other ways endeavoring to prevent the progress of the Union, were the guards. Richardson contended that the guards who were employed by the respondent were necessary in order to protect its property. While this may be true to some extent, the principal activity of the guards was to interfere with the employees in the exercise of the rights guaranteed by the Act, by coercing them into

joining or remaining members of the E.M.B.A., and by preventing their joining the Union or associating with its organizers.
(p. 107):

"The Union held advertised mass meetings at various places throughout the three counties in which the respondent's mines are located. These meetings were attended by guards and supervisory employees of the respondent, in particular by Beanie, Mansfield, Omers, and Shoulders, Superintendents Christian and Jones, Ray Cobb, assistant general superintendent of the respondent's Earlington division, and H. B. Hinton, foreman at No. 2 mine. The presence of these individuals at a meeting could have had no other consequence than to destroy its effectiveness.

In short, the Board treated the police as "employers" under the Act, and imputed their pro-union and anti-union conduct to the management, as a kind of wrong for which management as a whole must be held responsible. This could not have been done, had the Board considered then, as it argues in its brief now, that industrial police are invariably to be classed with the rank and file, as "employees," whose rights to assist or oppose unions must be enforced and cannot be denied.

6. *The status of policemen under the Act is not affected by the inconclusive experiences described in the Board's brief.*

In 1941 or 1942, at about the time when it first questioned its own rule concerning the status of foremen and supervisors under the Act, the Board for similar reasons (principally the pressure of claims asserted by certain large, industrial unions) wavered also in its adherence to the same rule as it applied to industrial policemen. The result in cases involving policemen (unlike that in the cases which involved foremen) was an early relaxation of the Board's old rule. Since 1942, the Board has on many occasions issued "decisions" and "directions of elections" by which it has developed and declared its intentions that the old rule shall be abandoned, and that the industrial policemen of the country shall be made subject to union organization and representation under the Act. These "decisions," beginning with the case of the *American Forge Company*, 44 N.L.R.B. 826 (October 6, 1942) were listed in the Board's petition for rehearing in the Court below, and the list is reproduced in the transcript here (R. 107-111).

This list is not entitled to the weight in this case which the Board's brief would give it. In its assertion (R. 107) that in all the decisions it lists the Board had approved "the bargaining pattern involved herein," the heading of the list is somewhat misleading. The assertion is true only to the extent that each of the decisions cited has reflected the Board's approval of *some* form of union representation for *some* kind of police or watchmen. Beyond this, the list has no relevant significance, for it includes indiscriminately cases involving the representation of militarized police, of non-military police

holding other types of commissions (none, however, like those of the Otis Works police), of private guards and of watchmen of all kinds; cases involving the representation of these diverse types of agents by rank and file unions, by unions representing only policemen, and by unions bearing other kinds of responsibility; and cases involving small factories and shops, office buildings, banks, and other establishments in which the problems of maintaining obedience to law, security, discipline and good order bear no resemblance to those presented in the huge, remotely located properties of the Otis Works. Such a wholesale catalogue of cases of all kinds is of no value here, except to the extent that it records the complete change, during the war years, of the Board's interpretation of the Act.

Even more important as a criticism of the Board's list, and of the argument sought to be based upon it, is the fact that none of the "decisions" listed by the Board's counsel has ever become a legally enforceable adjudication of the status of any policeman or watchman under the Act. All of the "decisions" listed were preliminary, interlocutory declarations, and none of them has ever been made final. Some of the cases have been abandoned by the Board and some by the interested parties. Some of the cases became moot by reason of the disappearance of the industrial establishments or the guard forces with which they were concerned. In others (doubtlessly those where the point did not matter to one side or the other) the parties agreed upon some *modus vivendi*, and so made further prosecution by the Board unnecessary and undesirable. As results of a variety of circumstances, of the characters just described and possibly others, none of the other cases listed by the Board ever assumed sufficient importance to anybody to justify any judicial

test or enforcement of the Board's "decision." Thus the only judicial decisions of the point presented here are the decisions—wholly adverse to the Board's new rule—entered by the Circuit Courts of Appeals in this case and in the companion *E. C. Atkins Co.* case.

The Board's reflections upon its list of cases, in its brief here, are not helped by its suppositions (based apparently only upon its lack of any report to the contrary) that in certain instances in which employers have voluntarily acquiesced in the union representation of their private policemen or watchmen, no notoriously evil consequences have followed.

Acquiescence of employers signifies nothing here. Such acquiescence on the part of an employer has meant, invariably, that the freedom of his police or watchmen from obligations to unions is a matter of no importance to him; that their duties to the employer are such, in short, that the employer has seen no incompatibility between them and the obligations of union membership. Such voluntary arrangements, whether they have been successful or not, are of no practical value here, in other words, because they have always depended upon circumstances which are not present in this case.

Although the union representation of watchmen and guards who deal with the general public, and not with rank and file labor (the case, for example, of the guards in a metropolitan bank), involves no great risk of the interests of the employer, the absence of objectionable consequences in cases of this kind cannot, of course, be a guide in the case presented here. On the contrary, it is a fact (although there is no reason why the Board should have any record of it) that no plan of the kind

defended in this case by the Board, no plan to unionize military police or municipal police in an establishment having any of the material characteristics of the Otis Works, has ever failed to impair the efficiency of the police force affected by it.

Finally, in closing this branch of the argument, the Board's references to its admittedly inconclusive experience are based upon a false view of its own powers and duties. If, as this brief is intended to show, the representation of policemen by rank and file unions was not contemplated by the Act, or if it will tend to subvert any of the purposes of the Act, then it must follow that the Board cannot lawfully command it; and this limitation of the Board's powers is not affected or relaxed by the views of this employer or that, or by those of any representative of labor, or even by those of the Board, concerning the merits of such union representation.

7. The status of the policemen who are involved in this case is not affected by their "demilitarization."

Certain portions of the Board's brief, those which relate to the Regulations issued by the Secretary of War for the guidance of the officers and members of the force of Auxiliary Military Police, are simply confusing if any attempt be made to apply them to this case. Unless they are intended to bear in some way upon the companion case of *E. C. Atkins & Co.*, these passages of the Board's presentation appear to argue points of fact and law which are not in controversy.

It was never contended by the Jones & Laughlin Steel Corporation, the owner and operator of the Otis

Works, and it was never held by the Court below, that the representation of the Otis Works police force by the rank and file steelworkers Union local was legally objectionable because, as Auxiliary Military Police, the policemen had become the agents of the United States and so had ceased to be "employees," under the exemption of federal *agents contained in* Section 2 (3) of the Act. It was shown at the earliest hearing of the case before the Board that (as were the facts) the police had been sworn and enrolled as Military Police; and it was contended, then and later, that their duties as Military Police, and their continuing duties as agents of management, were such as to require their freedom from any control, union or other, which might prejudice their courage and independence in their dealings with the rank and file, or with anyone else who might conceivably have interests adverse either to those of the Steel Corporation or to those of the United States.

In other words, from the beginning of the proceeding before the Board, the Steel Corporation has relied upon the same basic arguments which have already been made in this brief. Those arguments were not affected by the facts that the Otis Works police were "demilitarized" in May or June of 1944, and that their commissions as peace officers of the City and State Governments were thereupon revived. This change of their formal, official status did not result (and the military authorities intended that it should not result: R. 118) in any change of those functions and duties of the policemen which have affected their status under the National Labor Relations Act (R. 117).

After the demilitarization, the Steel Corporation was (as the Board's brief says) charged by federal

and state laws with the same responsibilities to maintain order and security in the steelworks, which it had borne before the demilitarization. After the change, as before it, the policemen were the only peace officers normally available in the steelworks, either to enforce the law or to enforce the lawful authority of management. As the Board has stipulated (R. 117), they did the same work, occupied the same positions in the Steel Corporation's plans of operation and management, and discharged the same useful duties to society at large. And, what is important to the purposes of the Act, the inconsistencies between their obligations as peace officers and agents of management, on the one hand, and the rights and obligations incident to their representation by the rank and file union on the other, were the same after the demilitarization as they had been before it.

These circumstances compel the view of the respondent, declared at the beginning of this argument, that the fact of demilitarization, followed as it was by the revival of the municipal police commissions, is a matter of no consequence in the proper disposition of this case. There is no dispute about the duties of the policemen; no need to argue at length the meaning of the military regulations; and, finally, no need to discuss the Board's proposition, never contested and not to be contested now, that the case is not moot.

III. Conclusion.

This is, with the companion case of *E. C. Atkins & Co.*, a case of first impression, in that the Courts have not heretofore decided the precise questions of interpretation of the National Labor Relations Act which are presented here.

It is true that the Courts have not, in any earlier case, settled the important question whether any union, and in particular any rank and file union, can command recognition, under the Act, as exclusive representative of any of the officers, foremen, policemen and others through whose agency employers deal with the rank and file of labor, and on occasion direct or control the members of the rank and file; or the intimately related question of the status under the Act, in this connection, of industrial police who are commissioned and relied upon by the State as its peace officers.

This does not mean, however, that these are difficult questions. It has been the purpose of this brief to show that they are not; that any difficulty they might otherwise present, has been eliminated, long since, by the teachings of the past decisions of this Court and the subordinate Courts.

By those earlier cases, two important purposes of the Act have been ascertained. It has been established by those cases that Congress contemplated and intended, when it formulated and passed the Act, among other things that the Board should preserve a sharp line between management and labor, for the two reasons which have been discussed here; and that the Board

should not, in its efforts to effectuate the policies of the Act, take any action which must subvert or infringe any other law, or any recognized consideration of public good.

If these principles be applied to the facts of this case, with a proper regard for the canons of construction, for the advantages of consistency and certainty in the definition of legal terms and legal rights, and for the practical consideration of fairness, justice and good economy which are present in every case of this kind, the only possible conclusion of the matter must be that reached by the Circuit Court of Appeals. It is submitted that its decision was a sound and correct one, which should be affirmed here.

Respectfully submitted,

JOHN C. BANE, JR.,
Attorney for Jones & Laughlin Steel Corporation.

Of Counsel:
H. PARKER SHARP,
PAUL J. WINSCHEL.

APPENDIX.

NATIONAL LABOR RELATIONS BOARD
WASHINGTON 25, D. C.
December 18, 1945

John C. Bane, Jr., Esquire
Messrs. Reed, Smith, Shaw & McClay
Union Trust Building
Pittsburgh, Pennsylvania

Re: *N.L.R.B. v. Jones & Laughlin Steel Corporation*
No. 9730 (C. C. A. 6)
Board No. 8-C-1548

Dear Mr. Bane:

I understand from Mr. Mallet-Prevost that the Jones & Laughlin Steel Corporation and the Board will stipulate the facts as to the demilitarization of, and as to the present number and function of, the plant guards involved in the above case, and will file briefs with the Court prior to argument during the February term.

I am enclosing a copy of a letter we received recently from the Army Service Forces establishing the fact of demilitarization on May 29, 1944. Mr. Mallet-Prevost tells me that he had expected to hear from you before now with respect to the present function of the guards. Since it is imperative that this case not be unnecessarily delayed further, I urge you to send us, by return mail, whatever factual material you wish to include in the stipulation. We will then prepare a draft

of the stipulation and forward it to you for your approval.

Yours very truly,

A. NORMAN SOMERS /s/
A. Norman Somers
Assistant General Counsel

Enclosure (1)

December 20, 1945

A. Norman Somers, Esq.
Assistant General Counsel
National Labor Relations Board
Washington 25, D. C.

In re: *N.L.R.B. v. Jones & Laughlin Steel Corporation.* No. 9730
Sixth Circuit Court of Appeals

My dear Mr. Somers:

Thank you for your letter of December 18, 1945.

We are accumulating the material required for the proposed stipulation, but that matter has been delayed by my own schedule, which has required me to be out of town during most of the time since I talked to Mr. Mallet-Prevost at Cincinnati.

I had not understood that Mr. Mallet-Prevost expected us to submit our idea of the present facts at any time before the end of the year. However, I hope to be in touch with you again before that time.

I think it should be entirely feasible to complete the proposed stipulation in time to permit the filing of

briefs in January and an argument of the case in February.

Best wishes to you for a Merry Christmas.

Yours truly,

JOHN C. BANE, JR. /s/

JCB,Jr:afs

NATIONAL LABOR RELATIONS BOARD
WASHINGTON 25, D.C.
January 15, 1946

John C. Bane, Esquire
c/o Reed, Smith, Shaw & McClay
747 Union Trust Building
Pittsburgh, Pennsylvania

Re: *National Labor Relations Board v. Jones & Laughlin Steel Corporation*
No. 9730 (C. C. A. 6)

Dear Mr. Bane:

As you no doubt have been informed, this case is set for argument before the Sixth Circuit on February 8, 1946. The Board's brief is now being prepared and will be filed in Court and a copy sent to you at the very earliest date possible. Although no dates for the filing of briefs were set by the Court, I assume that you will file the Company's brief as soon as you can upon receipt of the Board's brief.

In the meantime, since we have not received a proposed stipulation from you, we are enclosing a draft of stipulation containing the facts, insofar as we have them, which the Board desires to present. Please supply in paragraph 2 of the stipulation the facts with

respect to the present number of guards and their duties. As far as the Board is concerned, no other facts are necessary, but if you think otherwise please incorporate whatever material you wish in the stipulation and send the documents on to me with your signature.

Since the time is very short indeed, I am sure you will let me hear from you at the earliest possible moment.

Very truly yours,

A. NORMAN SOMERS /s/
A. Norman Somers
Assistant General Counsel

WESTERN
UNION

LO N GWA543 225/221 1/ 121 GOVT=WASHINGTON DC 16 657P
JOHN C BANE, JR, ESQUIRE,
CARE REED SMITH SHAW & MCCLAY=
747 UNION TRUST BLDG PGH=

RE: NLRB V JONES & LAUGHLIN STEEL CORPORATION, NO 9730 (C.C.A. 6). AS YOU KNOW, COURT HAS SET MATTER FOR ARGUMENT FEBRUARY 8. AT CONFERENCE HELD IN COURT CHAMBERS DECEMBER 4 IT WAS UNDERSTOOD YOU WERE TO SUPPLY DATA TO BE INCORPORATED IN STIPULATION CONCERNING THE PRESENT STATUS AND NUMBER OF PLANT GUARDS INVOLVED. I WROTE YOU ON DECEMBER 18, ENCLOSING LETTER FROM WAR DEPARTMENT ESTABLISHING DEMILITARIZATION OF PLANT GUARDS MAY 29, 1944 AND ASKING YOU TO EXPEDITE SUPPLYING MATERIAL. YOU WROTE BACK DECEMBER 20, INDICATING THAT THIS WOULD BE DONE WITHOUT UNDUE DELAY. YESTERDAY I WROTE YOU AGAIN, ENCLOSING A COPY OF A PROPOSED FORM OF STIPULATION EMBODYING THE INFORMATION SUPPLIED BY WAR DEPARTMENT WITH PROVISION FOR INSERTION BY YOU OF STATEMENTS OF NUMBER OF GUARDS NOW EMPLOYED BY RESPONDENT

AT OTIS WORKS PLANT AND OF THEIR PRESENT DUTIES. IN AN EFFORT TO EXPEDITE STIPULATION I PUT THROUGH A CALL TO YOUR OFFICE AS AN EMERGENCY CALL. I WAS TOLD YOU WERE OUT AND LEFT A MESSAGE FOR YOU TO CONTACT LONG-DISTANCE OPERATOR. I HAVE NOT HEARD FROM YOU. WILL YOU PLEASE WIRE WHETHER YOU ARE FORWARDING BY RETURN MAIL A STIPULATION EMBODYING THE INFORMATION CONTAINED IN THE WAR DEPARTMENT LETTER AND CONTAINING YOUR STATEMENT AS TO THE NUMBER OF GUARDS AT THE OTIS WORKS PLANT AND THEIR DUTIES=

=A NORMAN SOMERS ASSISTANT GENERAL COUNSEL NATIONAL LABOR RELATIONS BOARD.

January 19, 1946

A. Norman Somers, Esq.
Assistant General Counsel
National Labor Relations Board
Washington 25, D. C.

In re: *National Labor Relations Board v. Jones & Laughlin Steel Corporation*
No. 9730.

My dear Mr. Somers:

Enclosed herewith are two copies of a draft of a stipulation which is intended to complete the stipulation proposed in your letter of January 15, 1946. If you approve it, I think it would bring on the record of the Court in Cincinnati, in a way which would permit the Court to consider them, the new state of facts evidently contemplated by the Supreme Court's remand.

You will observe that we have attached as an exhibit a copy of a letter, dated May 29, 1944, signed by Major Hales in the Armed Service Forces Office at Cleveland. We have not attached the two letters written

long afterwards to your Board by Army officers. If you desire to attach your full correspondence, we shall have no particular objection.

In the matter of the time for filing briefs, subject to any different order the Court may make in the meantime, we shall be glad to accommodate ourselves as much as possible to your schedule. Under the general practice in this Court (and other appellate Courts with which we have acquaintance), the appellant is normally required to file his brief first, and the appellee is entitled to file an answer to the brief after a reasonable time. Since the Board appears as appellant here, this practice might be taken to mean that the Board's brief should be filed first; however, the stipulation has been greatly delayed because of my attack of influenza at the turn of the year and, more recently, by wholly unforeseen emergencies in this office, arising out of the spread of labor trouble in this district; and if it will be any accommodation to you, we shall be glad to exchange briefs with you at some time before the argument and during the first week in February. If, on reading our brief, you desire to file a reply but have no time to prepare it before the argument, we shall have no objection to the allowance of time for filing it after the argument; and we assume that you will grant us the same consideration.

Yours truly,

JOHN C. BANE, /s/

JCB,Jr:afs
Enclosures-2

NATIONAL LABOR RELATIONS BOARD
WASHINGTON 25, D. C.
January 22, 1946

John C. Bane, Jr., Esquire
Reed, Smith, Shaw & McClay
Union Trust Building
Pittsburgh, Pennsylvania

Re: *National Labor Relations Board v. Jones & Laughlin Steel Corporation*
No. 9730

My dear Mr. Bane:

I have your letter of January 19, 1946, and its enclosure.

Your suggested arrangement for the exchange of briefs is satisfactory and we plan to have a copy of our typewritten brief in your hands on or before February 1. We shall forward printed copies as soon as we receive them from the printer.

We are checking the facts in the proposed stipulation with our people in the Field and find that this is consuming a bit more time than was anticipated. Subject to such check, we are preparing our brief upon the hypothesis that the facts are as set forth in the proposed stipulation.

We shall sign and submit the stipulation as soon as the check is completed, which we are making every effort to expedite.

Yours very truly,

A. NORMAN SOMERS /s/
A. Norman Somers
Assistant General Counsel

CONSTITUTION OF INTERNATIONAL UNION
UNITED STEELWORKERS OF AMERICA
CIO

Adopted at Cleveland, Ohio, May 22, 1942

[Union Label]

Form 130 Printed in U. S. A.

* * * * * * *

MANUAL

* * *

INITIATION

President—Mr. Guide, are there any candidates in waiting who have been accepted by this Union?

Doorkeeper—Mr. President, I find Brothers.....
....., who were elected to become members of this body.

President—Admit the brothers.

The guide will admit the candidates and place them in a line opposite the President.

President—Fellow Steelworkers: The United Steelworkers of America requires perfect freedom of inclination in every candidate for membership to its body. An obligation of fidelity is required; let me assure you that in this obligation there is nothing contrary to your civil or religious duties. With this understanding are you willing to take an obligation which binds you upon your honor as a man to keep the same as long as life remains?

Each candidate answers—I am.

President—Raise your right hand.

"I do sincerely promise, of my own free will, to abide by the laws of this Union; to bear true allegiance

to, and keep inviolate the principles of the United Steelworkers of America; never to discriminate against a fellow worker on account of creed, color, or nationality; to defend freedom of thought, whether expressed by tongue or pen, to defend on all occasions and to the extent of my ability the members of our organization.

"That I will not reveal to any employer or his agent the name of anyone a member of our Union. That I will assist all members of our organization to obtain the highest wages possible for their work; that I will not accept a brother's job who is idle for advancing the interests of the Union or seeking better remuneration for his labor; and, as the steel workers of the entire country are competitors in the labor world, I promise to cease work at any time I am called upon by the organization to do so. And I further promise to help and assist all brothers in adversity, and to have all steel workers join our Union that we may be able to enjoy the fruits of our labor; that I will never knowingly wrong a brother or see him wronged, if I can prevent it.

"To all this I pledge my honor to observe and keep as long as life remains, or until I am absolved by the United Steelworkers of America."

Answer—I promise.

President—You are now members of Local Union No. ....., and entitled to all rights and privileges of members of the United Steelworkers of America.

NATIONAL LABOR RELATIONS ACT

(49 Stat. 449)

AN ACT

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contact, and employers who are organized in the corporate or other forms of ownership asso-

ciation substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, or the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

* * * * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or

political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

* * * * * * *

SEC. 3 (c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

* * * * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce em-

ployees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective

bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board

shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, *as will* effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If, upon all the testimony taken, the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

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(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the

proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by

the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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SEC. 16. This Act may be cited as the "National Labor Relations Act."

Approved, July 5, 1935.